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# Asylum at Last: Matter of A-R-C-G-'s Impact on Domestic Violence Victims Seeking Asylum

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## NOTE

### ASYLUM AT LAST?: *MATTER OF A-R-C-G*'S IMPACT ON DOMESTIC VIOLENCE VICTIMS SEEKING ASYLUM

Johanna K. Bachmair<sup>†</sup>

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## INTRODUCTION

Imagine a woman, a mother, beaten horrifically every week. Burned, bruised, and broken, she pleads for help from the police—but they refuse; her tormenter is her husband and marital relationships are no place for the government. The woman flees, first a few houses away, later, an entire city away. But she is dragged back by her abuser, again and again. Finally, she escapes to another country with her three children in tow. At last she has found a barrier that her abuser cannot cross. Does she deserve asylum? More to the point—will she be granted asylum?

Domestic violence is a global issue affecting millions of women.<sup>1</sup> The World Health Organization (WHO) estimates that it affects more than one in every three women worldwide and recently called it "a global health problem of epidemic proportions."<sup>2</sup> The 2010 National Intimate Partner and Sexual Violence Survey found that more than one-third of women in the United States have been raped, physically abused, or stalked by an intimate partner in their lifetime, and approximately seven million women reported experiencing such abuse in the

<sup>1</sup> Cf. Fran S. Danis & Lettie L. Lockhart, *Introduction to DOMESTIC VIOLENCE: INTERSECTIONALITY AND CULTURALLY COMPETENT PRACTICE*, at xxiii, xxiii–xxiv (Lettie L. Lockhart & Fran S. Danis eds., 2010) (discussing that domestic violence affects many people from many different backgrounds).

<sup>2</sup> See Press Release, World Health Org., *Violence Against Women: A 'Global Health Problem of Epidemic Proportions'* (June 20, 2013), [http://www.who.int/mediacentre/news/releases/2013/violence\\_against\\_women\\_20130620/en/](http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/) [<http://perma.cc/9CU8-VQ46>]; see also Fran S. Danis & Shreya Bhandari, *Understanding Domestic Violence: A Primer* ("At least one in every three women worldwide has been beaten, coerced into sex, or otherwise abused during her lifetime." (citation omitted)), in *DOMESTIC VIOLENCE: INTERSECTIONALITY AND CULTURALLY COMPETENT PRACTICE*, *supra* note 1 at 34.

year leading up to the survey.<sup>3</sup> More than half of female rape victims reported being raped by an intimate partner.<sup>4</sup>

*Matter of A-R-C-G-* involved a Guatemalan woman, Aminta Cifuentes, similar to the woman described above; she sought asylum to escape abuse by her husband.<sup>5</sup> Previously, similarly situated applicants from Guatemala and elsewhere were denied asylum in the United States because they failed to establish that they were members of a “particular social group” and suffered persecution *because* of their membership in that group.<sup>6</sup> Ms. Cifuentes succeeded where others had failed. Even more importantly, the Board of Immigration Appeals (BIA) made its decision binding—stunning those who had fought for such a precedential decision for years.<sup>7</sup> The BIA, which hears appeals from immigration judges’ decisions, had last issued a precedential decision dealing with domestic violence asylum claims in 1999, when it controversially reversed an asylum grant in *Matter of R-A-*.<sup>8</sup>

Scholars and asylum advocates had long urged the BIA to recognize that domestic violence victims can constitute a “par-

<sup>3</sup> MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 39 (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) [<http://perma.cc/DD7H-XEKL>].

<sup>4</sup> *Id.* at 1.

<sup>5</sup> 26 I. & N. Dec. 388 (B.I.A. 2014). Ms. Cifuentes was identified by name in an article in the *New York Times*. Julia Preston, *Woman Is First to Be Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES, Aug. 30, 2014, at A12.

<sup>6</sup> See, e.g., *Matter of R-A-*, 22 I. & N. Dec. 906, 917 (B.I.A. 1999) (en banc) (denying asylum to a woman who fled domestic violence because she could not prove that she was persecuted on account of her political opinion or her membership in the (unrecognized) particular social group consisting of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

<sup>7</sup> See, e.g., Preston, *supra* note 5 (“The decision . . . resolved nearly two decades of hard-fought legal battles over whether such women could be considered victims of persecution.”).

<sup>8</sup> For example, the American Immigration Lawyers Association criticized the BIA’s 1999 decision in *Matter of R-A-* as containing “clear errors and inconsistencies with established law.” See *AILA Comments to Proposed Regulations on Gender-Based Asylum*, AM. IMMIGRATION LAWYERS ASS’N (Jan. 17, 2001), <http://www.aila.org/content/default.aspx?docid=3006> [<http://perma.cc/699U-8N3D>]. Although the BIA reversed an immigration judge’s asylum grant in its 1999 decision, the Attorney General later vacated the BIA’s decision, and the applicant was eventually granted asylum in 2009. See *Matter of R-A-*, 22 I. & N. Dec. at 917; *Matter of A-R-C-G-*, 26 I. & N. Dec. at 391 n.12; see also Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2528–30 (2014) (discussing the lack of binding BIA decisions on the issue after *Matter of R-A-*).

ticular social group” under the Immigration and Nationality Act (INA).<sup>9</sup> In August 2014, when the BIA issued *Matter of A-R-C-G-*, it took a large step toward officially acceding to advocates’ pleas, but it did not go as far as some had recommended. The BIA did officially declare that “married women in Guatemala who are unable to leave their relationship” are a cognizable particular social group under the INA.<sup>10</sup> The question is, what now?

This Note analyzes *Matter of A-R-C-G-*’s potential impact on domestic violence-based asylum claims in the United States and more specifically on the proposed amendments to the Immigration and Naturalization Services (INS) regulations governing asylum and withholding eligibility. This Note explores how that judgment may affect how immigration judges interpret and apply asylum law’s “particular social group” provision, as well as how they interpret the associated requirement demanding nexus between group membership and the persecution. This Note also recommends that judges expand the holding in *Matter of A-R-C-G-* and how they should do so; for example, judges should recognize domestic violence victims from other countries as comprising particular social groups. Further, this Note suggests how the INS should revise the proposed amendments in light of *Matter of A-R-C-G-*.

Part I of this Note outlines asylum law’s development in the United States and the law as it currently stands, particularly as it relates to domestic violence victims. Part I also discusses U.S. asylum law’s “particular social group” provision and focuses on the provision’s application in key cases involving claims based on domestic violence. Part II analyzes *Matter of A-R-C-G-*’s potential impact on asylum adjudication in the United States. Part II concludes that although *Matter of A-R-C-G-* signifies the BIA’s official recognition that domestic violence may qualify a victim for asylum, more changes are needed before asylum seekers can securely base their claims on domestic violence. Part III suggests how judges could help advance the holding in *Matter of A-R-C-G-* and recommends other changes

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<sup>9</sup> See, e.g., Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 378 (2009) (“Refugee protection should be available to applicants who can prove that they have a well-founded fear of future persecution on account of their membership in the particular social group of ‘women who have fled severely abusive relationships.’”); Preston, *supra* note 5 (“Since 1995 . . . whether domestic abuse victims could be considered for asylum [has been] vigorously debated by advocates and repeatedly examined by the courts.”).

<sup>10</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389–90.

to the United States' approach to domestic violence asylum claims, such as revising and enacting the proposed regulation amendments.

## I BACKGROUND

The legal issues associated with refugees in the modern era erupted after World War II, as survivors sought safety around the world.<sup>11</sup> In response, the United Nations adopted the 1951 Convention Relating to the Status of Refugees. The Convention defined "refugee."<sup>12</sup> In 1968, the United States signed the 1951 Convention, as updated by the 1967 Protocol, and in 1980, the United States incorporated the updated refugee definition in the Refugee Act of 1980.<sup>13</sup> The Refugee Act was in turn codified in the INA.<sup>14</sup>

Today, to qualify for asylum under U.S. law an applicant must prove four elements: (1) presence outside of one's country of nationality, (2) unwillingness or inability to return to, or to receive protection from, the country of one's nationality, (3) the fact that he or she has suffered past persecution or possesses a "well-founded fear of [future] persecution," (4) and the fact that the persecution occurred "on account of" one of five delineated grounds: race, religion, nationality, membership in a particular social group, or political opinion.<sup>15</sup> Notably, neither gender nor sex is listed as a protected ground.

Domestic violence victims generally seek asylum based on membership in a particular social group because domestic abuse does not directly fall under any of the specified grounds

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<sup>11</sup> See generally Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129, 131–36 (2001) (discussing the post-World War II development of international refugee law).

<sup>12</sup> Convention Relating to the Status of Refugees art. I, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The 1951 Convention originally restricted its definition of "refugee" to those fleeing events occurring before January 1, 1951. *Id.* at art. I(A)(2). The 1967 Protocol removed this restriction. See Protocol Relating to the Status of Refugees art. I(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>13</sup> See Convention Relating to the Status of Refugees, *supra* note 12, 19 U.S.T. at 6223, 189 U.N.T.S. at 138; Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (codified at Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012)). See generally Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11, 43 (1981) (discussing the Refugee Act's incorporation of the Convention's definition of "refugee").

<sup>14</sup> Immigration and Nationality Act § 101(a)(42)(A).

<sup>15</sup> *Id.*

for persecution.<sup>16</sup> However, defining a legally acceptable “particular social group” “on account of”<sup>17</sup> the grounds on which a domestic violence victim was harmed has proven to be challenging and risky.

#### A. Issues with Adjudication and Commonly Suggested Solutions

Although the United States has taken significant steps to eliminate gender-based violence,<sup>18</sup> asylum claim adjudications remain wildly inconsistent.<sup>19</sup> This inconsistency leaves victims facing doubt, and worse, injury and even murder if their claim fails and they are forced to return to their native country and abuser. Importantly, even when an immigration judge finds that an asylum seeker has testified credibly to the first three elements—presence outside of their country of nationality, an unwillingness or inability to return to their country or receive protection from their country’s government, and harm that rises to the level of persecution—the case often turns on whether the abuse occurred *on account of* the victim’s membership in a particular social group. This is known as the nexus requirement.<sup>20</sup> Thus, how a judge applies and interprets this final element makes or breaks many cases.<sup>21</sup>

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<sup>16</sup> See Barbara R. Barreno, Note, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 229 (2011). Scholars have highlighted the irony that the United States would welcome a “classic refugee” “with open arms” when that classic refugee was seeking protection based on fear of persecution by a tyrannical ruler of a realm documented as targeting a particular tribe, especially when that tribe challenged the tyrant. See Cianciarulo & David, *supra* note 9, at 339. However, the United States would not entitle a domestic violence victim to the same protection because the tyrant is the spouse, the realm is the home, and the tribe is women, especially those in a relationship with the tyrant. See *id.*

<sup>17</sup> 8 U.S.C. § 1101(a)(42) (2012).

<sup>18</sup> For example, the United States passed the Violence Against Women Act (VAWA) in 1994. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, 119 Stat. 2960 (codified in scattered sections of 42 U.S.C. (2006)). VAWA offers two different visas for victims of domestic violence. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386 div. A § 107, 114 Stat. 1464, 1474–80 (codified as amended at 22 U.S.C. § 7105 (2012)) (providing a visa for victims of severe forms of trafficking); *id.* div. B § 1513, 114 Stat. at 1533–37 (codified at 8 U.S.C. § 1101 (2012)) (creating a visa that protects victims of certain crimes, such as domestic violence, who cooperate with authorities in prosecuting those crimes).

<sup>19</sup> See Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107, 108–10, 147–48 (2013); Marsden, *supra* note 8, at 2512.

<sup>20</sup> See Bookey, *supra* note 19, at 108 n.5 (discussing the nexus requirement within the context of “[g]ender asylum”).

<sup>21</sup> See, e.g., *Matter of R-A-*, 22 I. & N. Dec. 906, 913–14 (B.I.A. 1999) (en banc) (denying asylum even though “the level of harm experienced by the respondent

Differences in how decision makers apply particular social group analysis and the nexus requirement led to a well-documented problem—inconsistency in adjudication.<sup>22</sup> Scholars and advocates have suggested various reforms to combat this issue. One frequently proposed idea is to recognize gender as a “particular social group.”<sup>23</sup> Others propose adding gender as a sixth ground for asylum claims.<sup>24</sup> Some scholars support either change—anything to improve on the “logical inconsistencies” of the current guidelines.<sup>25</sup> However, such recommendations must now be adapted to reflect the BIA’s groundbreaking declarations in *Matter of A-R-C-G*.<sup>26</sup>

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risers beyond the threshold of that required for ‘persecution’” because “[t]he determinative issue . . . is whether the harm experienced by the respondent was, or in the future may be, inflicted ‘on account of’ a statutorily protected ground” (quoting Memorandum from Phyllis Coven, Immigration and Naturalization Service, on Considerations for Asylum Officers Adjudicating Asylum Claims from Women to INS Asylum Officers (May 26, 1995), <http://www.state.gov/s/1/65633.htm> [<https://perma.cc/AE9Q-XKSJ>]), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008); *Matter of A-R-C-G*, 26 I. & N. Dec. 388, 395 (B.I.A. 2014) (emphasizing that in cases where nexus is not conceded, it is an issue that must be decided); *see also* Bookey, *supra* note 19, at 121.

<sup>22</sup> *See* Bookey, *supra* note 19, at 110 (“[T]he absence of binding norms remains a major impediment to fair and consistent outcomes for women who fear return to countries where they confront unimaginable harms . . .”).

<sup>23</sup> *See, e.g.,* Michael G. Heyman, *Protecting Foreign Victims of Domestic Violence: An Analysis of Asylum Regulations*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 149 (2008) (“Rather than crafting a hyper-detailed description of social group that seems patently unrealistic, counsel could rely on women as the cognizable group.”); Barreno, *supra* note 16, at 255–58 (“An alternative . . . is to allow applicants to claim gender as their particular social group or as ‘the defining characteristic’ of that group.” (quoting Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1239 (2009))); Crystal Doyle, Note, *Isn’t “Persecution” Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. C.R. & SOC. JUST. 519, 553–54 (2009); Marsden, *supra* note 8, at 2544 (suggesting a regulation stating that “a social group defined solely by the gender of its members is cognizable as a particular social group”).

<sup>24</sup> *See, e.g.,* Barreno, *supra* note 16, at 254–55 (“Given the prevalence of domestic violence . . . one possible solution is to add gender as a sixth basis for an applicant’s asylum claim.” (citing Leonard Birdsong, *A Legislative Rejoinder to “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .,”* 35 WM. MITCHELL L. REV. 197, 215 (2008))).

<sup>25</sup> *See* Doyle, *supra* note 23, at 553–54 (“The addition of a sixth ground or the inclusion of statutory definitions that explicitly define the term ‘particular social group’ to include ‘gender’ would provide more clarity than the common law ‘innate characteristic’ test and avoid the logical inconsistencies of the various guidelines.”).

<sup>26</sup> *See infra* Part III.C.2.



B. Changing Interpretations of “Particular Social Group” and the Nexus Between Group Membership and Persecution

In *Matter of Acosta*, the BIA first defined “membership in a particular social group.”<sup>27</sup> The BIA stated that “‘persecution on account of membership in a particular social group’ . . . mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”<sup>28</sup> The BIA added that the common characteristic “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>29</sup> The BIA justified this interpretation as in line with the goal of granting asylum only to those individuals who by their own actions are unable, “or as a matter of conscience should not be required, to avoid persecution.”<sup>30</sup> Asylum seekers put this interpretation to the test in a line of cases involving domestic violence-based claims.

1. *Matter of R-A-: The Root of “Social Visibility”*

In *Matter of R-A-*, a case that some refer to as “one of the most controversial gender-based asylum cases in United States history,”<sup>31</sup> Rody Alvarado sought asylum based on membership in a particular social group.<sup>32</sup> She defined her group as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>33</sup> An immigration judge granted Alvarado asylum, but the BIA rejected the defined social group and reversed the grant of asylum because the applicant had not shown that it was a “recognized and understood . . . societal

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<sup>27</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>28</sup> *Id.* at 233.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 234.

<sup>31</sup> Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1202 (2009); see also *supra* note 8 and accompanying text.

<sup>32</sup> Ms. Alvarado is identified, *inter alia*, in a summary of the case by the Center for Gender and Refugee Studies. *Matter of R-A-*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-r> [<http://perma.cc/YPV3-BJUT>].

<sup>33</sup> *Matter of R-A-*, 22 I. & N. Dec. 906, 917 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008). The applicant also sought asylum based on her political opinion, but the BIA rejected that claim as well. *Id.* at 906.

faction” or that she was abused *because* her husband viewed her as a member of that group.<sup>34</sup>

The BIA emphasized that a social group definition merely identifying a common, immutable characteristic was not enough—rather, although “not determinative, the prominence or importance of a characteristic *within a society* is another factor bearing on whether we will recognize that factor as part of a ‘particular social group’ under our refugee provisions.”<sup>35</sup>

Although the BIA’s decision in *Matter of R-A-* was heavily criticized<sup>36</sup> and regulations were proposed in 2000 to address those and other asylum issues, *Matter of R-A-* was stayed for many years and the regulations remain pending today.<sup>37</sup>

Significantly, the holding in *Matter of R-A-* caused judges to hone in on evaluating how the asylum seeker’s native society perceived the proposed social group. This focus eventually led to a heavy emphasis on “social visibility” and “particularity” as key factors for analyzing whether a proposed group qualified as a “particular social group” within the INA’s meaning.<sup>38</sup> Decision makers relied on a highly specific definition of social group, requiring that purported social groups had particular and well-defined boundaries, as well as recognizable social visibility.<sup>39</sup> For years, nothing steered the BIA away from this restrictive path.

<sup>34</sup> *Id.* at 918–20.

<sup>35</sup> *Id.* at 919 (emphasis added).

<sup>36</sup> See Cianciarulo & David, *supra* note 9, at 368–71; Marsden, *supra* note 8, at 2529; Reimann, *supra* note 31, at 1204 (“*In re R-A-* was immediately followed by a flurry of intense criticism . . .”).

<sup>37</sup> The proposed rules would amend the asylum regulations relating to and defining the terms “persecution,” “on account of,” and “particular social group.” See Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76597–98 (proposed Dec. 7, 2000); *Matter of R-A-*, 22 I. & N. Dec. 906, 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

<sup>38</sup> See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) (“In deciding this question, we are guided by our recent decisions holding that membership in a purported social group requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility.”); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007) (applying the “‘social visibility’ test” and the “particularity requirement of the refugee definition” to the respondents’ case).

<sup>39</sup> See, e.g., *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (B.I.A. 2014) (“In a series of cases, we applied the concepts of ‘social visibility’ and ‘particularity’ as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements.”).

## 2. “Social Visibility” Emerges in Full Force

The BIA first mentioned “social visibility” in *Matter of C-A-* while evaluating whether membership in a proposed particular social group qualified the applicant for asylum.<sup>40</sup> The BIA emphasized that it based such decisions in part on the “recognizability, i.e., the social visibility, of the group in question,” stressing that a claimed group’s visibility is “an important element in identifying the existence of a particular social group.”<sup>41</sup> In *Matter of C-A-*, the asylum seeker proposed that he belonged to a particular social group comprised of “noncriminal drug informants working against the Cali drug cartel.”<sup>42</sup> However, the BIA held that this group did not fall within the INA’s “refugee” definition, relying in large part on “the lack of social visibility of the members of the purported social group.”<sup>43</sup> Specifically, the BIA held that this proposed social group lacked “social visibility” because it found that members of the asylum seeker’s society, and the Cali cartel, would not recognize group members, as their defining traits were not visible.<sup>44</sup> Rather, “the very nature of the conduct at issue is such that it is generally out of the public view. In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered.”<sup>45</sup>

Over the next few years the BIA looked to “social visibility” time and again until it became the standard for evaluating proposed particular social groups.<sup>46</sup> By 2007, the BIA even referred to this new factor as a “requirement.”<sup>47</sup> The new requirement meant that domestic violence victims faced an uphill battle attempting to prove their asserted group’s “social visibility” because domestic violence victims often suffer in silence behind closed doors.<sup>48</sup>

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<sup>40</sup> 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006).

<sup>41</sup> *Id.* at 959–60.

<sup>42</sup> *Id.* at 957.

<sup>43</sup> *Id.* at 961.

<sup>44</sup> *Id.* at 959–60.

<sup>45</sup> *Id.* at 960.

<sup>46</sup> See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586–88 (B.I.A. 2008) (noting the “importance of social visibility as a factor in the particular social group determination”); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007) (applying the “social visibility” test to respondents’ proposed particular social group of “wealthy Guatemalans”).

<sup>47</sup> *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74.

<sup>48</sup> See Danis & Bhandari, *supra* note 2, at 29, 33 (“Because much [domestic] violence occurs in the privacy of the home, it is important to recognize that many incidents go unreported . . .”). This is particularly true in societies that implicitly condone domestic violence by failing to protect the victim. See Cianciarulo & David, *supra* note 9, at 369–70; Fatma E. Marouf, *The Emerging Importance of*

In *Matter of C-A-*, the BIA also focused on an additional factor: “particularity.”<sup>49</sup> Later BIA decisions picked up this element, clarifying that particularity is about “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”<sup>50</sup> The BIA rejected purported groups that were “a potentially large and diffuse segment of society” as lacking particularity, citing concerns that in such instances it became more likely that the persecutor did not necessarily torment the victim *because of* their membership in the alleged group.<sup>51</sup> This application of “particularity” posed a significant hurdle to domestic violence victims seeking asylum—a consistently large and diverse group.<sup>52</sup>

### 3. *Signs of Change: DHS Support for Granting Asylum to Domestic Violence Victims*

In 2009, change came from an unexpected corner—the Department of Homeland Security (DHS). That year the DHS wrote a brief suggesting group formulations that a domestic violence victim might use to qualify for asylum.<sup>53</sup> The DHS drafted the brief in response to *Matter of L-R-*, wherein the BIA denied asylum to a Mexican domestic violence victim because the social group that she claimed membership in—“Mexican women in an abusive domestic relationship who are unable to leave”—lacked social visibility and particularity.<sup>54</sup> The DHS suggested that “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” could qualify as particular social groups.<sup>55</sup> It asserted that its proposed definitions were viable because they identified *why* the persecutor targeted the victim<sup>56</sup>—one of the points

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“Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender, 27 YALE L. & POL’Y REV. 47, 94–95 (2008).

<sup>49</sup> See 23 I. & N. Dec. at 957 (declaring that the proposed social group was “too loosely defined” to satisfy particularity).

<sup>50</sup> *Matter of S-E-G-*, 24 I. & N. Dec. at 584.

<sup>51</sup> *Id.* at 585.

<sup>52</sup> See Danis & Lockhart, *supra* note 1, at xxiii–xxiv.

<sup>53</sup> Department of Homeland Security’s Supplemental Brief at 14–16, *Matter of L-R-* (B.I.A. Apr. 13, 2009) [hereinafter DHS Brief], <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf> [<http://perma.cc/Z2MN-SHSE>].

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.* at 14.

<sup>56</sup> *Id.* at 14–15.

that the BIA had found lacking in the social group definition proposed in *Matter of R-A*—and they met the visibility and particularity requirements.<sup>57</sup>

Notably, the definitions that DHS suggested were not very novel—one differed from the definition initially rejected in *Matter of L-R*—only in that it eliminated the word “abusive.” Nonetheless, Alvarado’s attorneys jumped on the DHS’s apparent willingness to recognize domestic violence-based social groups and submitted a memorandum in her still-undecided case, proposing a new social group definition for their client modeled after the DHS’s suggestions: “married women in Guatemala who are unable to leave the relationship.”<sup>58</sup>

Alvarado eventually won asylum,<sup>59</sup> beginning a trend toward scrutinizing social group definitions less strictly. Three months later the respondent in *L-R* was also granted asylum based on the social group definition that the DHS had recommended.<sup>60</sup>

Meanwhile, the circuits split as to whether particular social group analysis required “particularity” and “social visibility,” questioning the importance of those factors.<sup>61</sup> Scholars and asylum advocates viewed these decisions as the dawning of a new era in which domestic violence victims seeking asylum

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<sup>57</sup> See *Matter of R-A*, 22 I. & N. Dec. 906, 919 (B.I.A. 1999) (en banc) (“Our past case law points out the critical role that is played in ‘social group’ analysis by common characteristics which potential persecutors identify as a basis for the infliction of harm.”), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008); see also Barreno, *supra* note 16, at 246–47.

<sup>58</sup> Legal Memorandum & Supporting Documentation at 3–4, 8, *Matter of R-A*, 24 I. & N. Dec. 629 (A.G. 2008) (File No. A 73 753 922), [http://cgrs.uchastings.edu/sites/default/files/R-A\\_brief\\_immigration\\_court\\_08\\_19\\_2009\\_0.pdf](http://cgrs.uchastings.edu/sites/default/files/R-A_brief_immigration_court_08_19_2009_0.pdf) [<http://perma.cc/92LA-HTWX>]. The DHS had suggested the definition “Mexican women in domestic relationships who are unable to leave” in its 2009 brief. See DHS Brief, *supra* note 53, at 14–15.

<sup>59</sup> See *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 391 n.12 (B.I.A. 2014).

<sup>60</sup> Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14. The particular social group in this case was “Mexican women in domestic relationships who are unable to leave.” See Brief of Respondents in Support of Applications for Asylum, Withholding of Removal & CAT Relief at 41, *Matter of L-R* (B.I.A. Mar. 10, 2010).

<sup>61</sup> Compare *Umaña-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013) (holding that an alleged social group must be particular and socially visible), *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (deferring to the BIA’s “particularity” and “social visibility” test), and *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012) (affirming that “a social group requires sufficient particularity and visibility” (quoting *Constanza v. Holder*, 647 F.3d 749, 753 (2011))), with *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011) (holding that the BIA’s “particularity” and “social visibility” requirements were not entitled to deference), and *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting the social visibility requirement).

could feel secure that their claims, if similar to L-R's and Alvarado's, would succeed.<sup>62</sup> However, their hopes flew too high. Neither decision was binding, leading to inconsistencies in adjudication because immigration judges were hesitant to rely on nonbinding decisions, particularly in the face of "social visibility" and "particularity" requirements that had long been read narrowly.<sup>63</sup> Precedential recognition only came half a decade later, in August 2014, in *Matter of A-R-C-G*.<sup>64</sup>

## II

### ANALYSIS OF THE POTENTIAL IMPACT OF *MATTER OF A-R-C-G*

In *Matter of A-R-C-G* the BIA recognized that under some circumstances domestic violence victims can comprise a particular social group that qualifies for asylum.<sup>65</sup> Importantly, this holding was binding—a fact that distinguished it from nonprecedent asylum grants in the past.<sup>66</sup> The applicant, Aminta Cifuentes, was a married Guatemalan woman who fled her abusive husband and entered the United States without inspection in 2005.<sup>67</sup> An immigration judge initially rejected her asylum claim, but Cifuentes appealed, arguing that she had proven her "eligibility for asylum as a victim of domestic violence."<sup>68</sup> Significantly, when the BIA responded to her appeal it explicitly considered "whether domestic violence can, in some instances, form the basis for a claim of asylum" and accepted that Cifuentes's claim asserted a valid particular social group.<sup>69</sup>

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<sup>62</sup> See, e.g., Cianciarulo & David, *supra* note 9, at 378 ("[I]t is indeed promising that the Department of Homeland Security appears receptive to domestic violence-based asylum in the United States."); Julia Preston, *Officials Endorse Asylum for Abuse: U.S. May Be Open to Claims of Women*, N.Y. TIMES, Oct. 30, 2009, at A14.

<sup>63</sup> See Bookey, *supra* note 19, at 109–10; Marsden, *supra* note 8, at 2530. Further, in each case both sides had agreed that asylum should be granted. See Bookey, *supra* note 19, at 117 n.40. The immigration judge highlighted that point when granting asylum in *Matter of R-A*, interpreting the case as essentially an agreement by the parties to grant asylum. See *id.* at 117 n.41.

<sup>64</sup> 26 I. & N. Dec. at 392–94.

<sup>65</sup> See *id.* at 392–93.

<sup>66</sup> For example, although asylum was eventually granted in *Matter of R-A* and *Matter of L-R*, neither decision was binding. See *supra* note 63 and accompanying text.

<sup>67</sup> See *Matter of A-R-C-G*, 26 I. & N. Dec. at 388–89; see also Preston, *supra* note 5, at A12 (discussing Aminta Cifuentes's background and the decision in *Matter of A-R-C-G*).

<sup>68</sup> *Matter of A-R-C-G*, 26 I. & N. Dec. at 390.

<sup>69</sup> *Id.*

This recognition—that advocates had fought for decades to win—clarified the BIA’s position on domestic violence-based asylum claims and provided some guidance in this muddled, hotly debated area.<sup>70</sup> Many hope that the holding will finally resolve confusion over how decision makers should apply the “particular social group” provision.<sup>71</sup> As one advocate phrased it, “A judge can no longer say, ‘I believe these horrible things happened to you but this is just a criminal act, this is not persecution.’”<sup>72</sup> However, upon closer inspection *Matter of A-R-C-G-* only provides limited guidance that will likely not remedy the long-standing inconsistencies that have plagued asylum applications by domestic violence victims. It is merely a step, albeit a significant one, toward a true solution sometime in the future. Further, the novel approach used in *Matter of A-R-C-G-* may give rise to new problems with interpretation and application.

#### A. The New “Social Distinction” Factor in Asylum Claim Analysis

Significantly, shortly before deciding *Matter of A-R-C-G-* the BIA issued several decisions that re-envisioned “social visibility.” Most notably, on February 7, 2014, the BIA rejected the restrictive “social visibility” requirement and renamed it “social distinction” in the complementary cases *Matter of W-G-R-* and *Matter of M-E-V-G-*.<sup>73</sup> Adopting this new factor marked a significant change in the BIA’s approach to particular social group analysis—a change that the BIA used in *Matter of A-R-C-G-* to recognize that domestic violence victims can constitute a particular social group under certain circumstances.

In *Matter of M-E-V-G-*, the BIA acknowledged that for years asylum adjudications were filled with “confusion and a lack of consistency as adjudicators struggled with various possible social groups.”<sup>74</sup> The BIA declared its intention to “clarify our interpretation of the phrase ‘membership in a particular social group’” to encourage consistency in nationwide adjudication of

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<sup>70</sup> See, e.g., Preston, *supra* note 5 (“Since 1995 . . . whether domestic abuse victims could be considered for asylum [had been] vigorously debated by advocates and repeatedly examined by the courts.”).

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* (quoting Karen Musalo, who is a “professor and director of the Center for Gender and Refugee Studies at the University of California, Hastings College of the Law”).

<sup>73</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 228 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 212 (B.I.A. 2014).

<sup>74</sup> 26 I. & N. Dec. at 231.

asylum claims.<sup>75</sup> The BIA renamed “social visibility” “social distinction” to make clear that this requirement is aimed at determining “whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, *if the . . . characteristic were known*, those with [it] . . . would be meaningfully distinguished from those who do not have it.”<sup>76</sup> The BIA emphasized in *Matter of W-G-R-* that such a characteristic does not need to be literally visible: “To be socially distinct, a group need not be *seen* by society; it must instead be *perceived* as a group by society.”<sup>77</sup> This distinction is crucial to many domestic violence asylum claims because, as mentioned earlier, victims often suffer in silence, hiding their abuse from society.<sup>78</sup>

*Matter of M-E-V-G-* and *Matter of W-G-R-* dealt with claims based on gang violence,<sup>79</sup> but the changes that they introduced set the stage for the BIA to re-evaluate social group definitions for domestic violence victims.

#### B. How the “Social Distinction” Requirement May Impact Asylum Claims Based on Domestic Violence

The BIA relied on the newly developed “social distinction” concept to hold in *Matter of A-R-C-G-* that domestic violence victims can constitute a particular social group under the INA.<sup>80</sup> The BIA had first used “social distinction” a few months earlier to replace the “social visibility” test in cases having nothing to do with domestic abuse.<sup>81</sup> The actual impact that this new factor will have on particular social group analysis within the domestic violence context—and beyond—is not immediately clear.<sup>82</sup> However, the BIA’s comments on “social distinction” in *Matter of A-R-C-G-* reveal several possibilities. Importantly, when predicting how judges will apply the “social distinction” requirement in the domestic violence context, the unique challenges that domestic violence claims present must

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<sup>75</sup> *Id.* at 234.

<sup>76</sup> *Id.* at 238 (emphasis added).

<sup>77</sup> 26 I. & N. Dec. at 216.

<sup>78</sup> See *supra* note 48 and accompanying text.

<sup>79</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. at 229; *Matter of W-G-R-*, 26 I. & N. Dec. at 209.

<sup>80</sup> 26 I. & N. Dec. 388, 393–94 (B.I.A. 2014).

<sup>81</sup> See *Matter of M-E-V-G-*, 26 I. & N. Dec. at 228, 238 and *Matter of W-G-R-*, 26 I. & N. Dec. at 209, 216, both dealing with asylum claims based on gang violence, for the “social visibility” concept’s earliest appearances.

<sup>82</sup> *Matter of A-R-C-G-* was decided very recently, on August 26, 2014.



be taken into account. The BIA has admitted as much,<sup>83</sup> but its approach nonetheless presents several potential difficulties for such claims.

1. *Social Distinction Determined from Society's Perspective*

*Matter of A-R-C-G-* emphasized several key aspects that supposedly differentiate "social distinction" from previous, similar formulations. First, the BIA stressed that a group's recognition is determined from society's perspective, not the persecutor's.<sup>84</sup> Previously, judges would consider both perspectives in their determinations.<sup>85</sup> This clarification could benefit domestic violence victims, whose abusers may very well refuse to acknowledge them as members of a distinct group.<sup>86</sup> Batterers often blame their targets for the abuse, rather than acknowledging their targets as victims.<sup>87</sup> For this reason persecutors may resist recognizing their targets as members of a group of domestic violence victims, making it difficult for asylum seekers to satisfy a social perception requirement based on their persecutors' perspectives. For example, in 2001 in *Matter of R-A-*, Alvarado's claim was rejected in part because she did not show that "male oppressors see their victimized companions as part of [the] group" that she had proposed.<sup>88</sup> Now asylum seekers will not need to struggle to satisfy that requirement.

2. *Perceiving, as Opposed to Seeing, a Social Group*

Second, the BIA reaffirmed another refinement that it had recently added to its analysis—the distinction between groups that are "seen" in society as opposed to groups that are *per-*

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<sup>83</sup> See *Matter of A-R-C-G-*, 26 I. & N. Dec. at 394 ("[C]ases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction.").

<sup>84</sup> See *id.*

<sup>85</sup> See, e.g., *Matter of R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999) (en banc) ("The respondent has shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group."), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

<sup>86</sup> See Cianciarulo & David, *supra* note 9, at 370 ("As part of the effort to control, marginalize and subjugate women, domestic violence is relegated to the private sphere and is not openly discussed . . .").

<sup>87</sup> See LENORE E. WALKER, *THE BATTERED WOMAN* 60, 66–67 (1979).

<sup>88</sup> 22 I. & N. Dec. at 918.

ceived.<sup>89</sup> In *Matter of M-E-V-G* the BIA had declared that the “social visibility” test “was never intended to . . . require[ ] literal or ‘ocular’ visibility”<sup>90</sup> and accordingly only required that a group “be perceived as a group by society” to be socially distinct.<sup>91</sup> The BIA cited this new definition in *Matter of A-R-C-G*, even though it did not highlight the distinction’s importance in the domestic violence context.<sup>92</sup> Nonetheless, it seems clear that because domestic violence victims often suffer behind closed doors, they will have an easier time proving that they are *perceived* as a group, even if they cannot show that they are literally *seen* by society.<sup>93</sup>

Toward this end, asylum seekers can now seemingly point to evidence, such as agencies and other resources in their countries intended to help domestic violence victims, to show that their society perceives them as a group.<sup>94</sup> Additionally, the BIA relied on evidence such as State Department reports, human rights reports, and news articles indicating that Guatemala has a “culture of ‘machismo and family violence’” to hold that the group proposed in *Matter of A-R-C-G* was socially distinct.<sup>95</sup> This new approach could benefit asylum seekers from countries that will not or cannot provide adequate protection via official sources, such as the police, especially because victims living in societies that thereby implicitly condone domestic violence are even more likely to hide their abuse from society.<sup>96</sup> Thus, the “social distinction” approach offers several advantages compared to the “social visibility” test, particularly for domestic violence victims seeking asylum.

Still, it is important to note issues with the social perception approach raised by scholars such as Fatma Marouf, who highlighted that “[w]hether a group is socially perceived as distinct cannot be treated as an all-or-nothing phenomenon, as social perception is a ‘subjective process shaped by an individual’s current motivation, emotion, and cognition, as well as his

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<sup>89</sup> See *Matter of A-R-C-G*, 26 I. & N. Dec. at 393–94.

<sup>90</sup> 26 I. & N. Dec. 227, 234 (B.I.A. 2014).

<sup>91</sup> *Id.* at 240; see also *supra* note 77 and accompanying text (discussing the emergence of the distinction between “perceived” and “seen”).

<sup>92</sup> 26 I. & N. Dec. at 393.

<sup>93</sup> See *supra* note 48 and accompanying text.

<sup>94</sup> See *Matter of A-R-C-G*, 26 I. & N. Dec. at 394 (“Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence . . .”).

<sup>95</sup> *Id.* at 393–94 (quoting *Guatemala Failing Its Murdered Women: Report*, CBC (July 18, 2006, 11:22 AM), <http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240> [<https://perma.cc/X7RW-DDX2>]).

<sup>96</sup> See *supra* note 48 and accompanying text.

or her more long-standing traits' . . . ."<sup>97</sup> Not only is social perception dynamic, but as Marouf noted: "In some cases, the same group may be both socially invisible and hypervisible as a stereotypical object."<sup>98</sup> The fluid, subjective nature of social perception poses serious problems when relying on it as a method for determining whether a social group exists. The major challenge, summed up by Marouf, is that "it would be naïve for adjudicators to treat social perception . . . as a consistent and reliable means."<sup>99</sup>

### 3. *Problems with Matter of A-R-C-G-*

The BIA's rationale in *Matter of A-R-C-G-* presents several potential issues for domestic violence victims. For example, the BIA recommended that immigration judges focus their social distinction analysis on "whether the society in question recognizes the need to offer protection to victims of domestic violence" and rely on evidence such as laws against domestic violence in the asylum seeker's native country, and whether those laws are enforced.<sup>100</sup> These guidelines seemingly aim to accommodate asylum seekers fleeing countries that recognize the domestic violence epidemic and have put protective laws in place, even if those laws go unenforced. For example, asylum seekers who repeatedly seek help from the police, but are refused, apparently qualify for asylum like Aminta Cifuentes.<sup>101</sup> This reading is supported by the BIA's emphasis on the fact that Cifuentes's native Guatemala "has laws in place to prosecute domestic violence crimes, [but] enforcement can be problematic."<sup>102</sup>

However, the BIA's explanation is not quite clear. Implicit in the focus on protective laws is the message that asylum seekers have the best chance at success if they present evidence that native authorities refused to enforce laws intended to protect them. But what if there are no such laws? What if the asylum applicant never went to the police?<sup>103</sup> The BIA did

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<sup>97</sup> Marouf, *supra* note 48, at 73 (quoting Matthew D. Lieberman & Jennifer H. Pfeifer, *The Self and Social Perception: Three Kinds of Questions in Social Cognitive Neuroscience*, in *THE COGNITIVE NEUROSCIENCE OF SOCIAL BEHAVIOUR* 195 (Alexander Easton & Nathan J. Emery eds., 2005)).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. at 394.

<sup>101</sup> *See id.* at 389.

<sup>102</sup> *Id.* at 394.

<sup>103</sup> Notably, such circumstances could also make it difficult for an applicant to meet asylum claim requirements other than social distinction. For example, *Matter of A-R-C-G-* was remanded for the immigration judge to determine whether the

not clarify whether the social distinction test demands proof that protective laws exist or whether applicants must attempt to obtain protection via such laws, if they exist. Without clear guidance on these points, decision makers could require that applicants prove that their government officially recognizes domestic violence via criminal laws designed to protect victims, and that they have sought protection through those laws. Worryingly, applying the “social distinction” test this way would exclude the most vulnerable victims—those whose native governments do not make any official attempt to protect them and those who for some reason cannot or do not seek or receive protection from official sources.

Even aside from the BIA’s problematic suggestions regarding evidence for “social distinction,” it is concerning that the BIA’s “social distinction” definition differs little from “social visibility.” In *Matter of A-R-C-G-* the BIA declared that “social distinction” exists when the society in question “perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”<sup>104</sup> This definition sounds eerily similar to the requirement that Rody Alvarado failed more than a decade ago—“a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala.”<sup>105</sup> Such similarity is unsurprising when old approaches are refined rather than overruled, but it gives rise to the concern that the underlying reasoning—now used to support the opposite finding—will crumble if challenged.

Notably, the DHS conceded in *Matter of A-R-C-G-* that a particular social group existed and that the persecution occurred because the victim belonged to that group.<sup>106</sup> This allowance makes the strength of the BIA’s reasoning even more questionable. What happens when the DHS does not concede? If the DHS does reject a claim and push comes to shove, the main rationale justifying *Matter of A-R-C-G-*’s result—“social distinction”—is essentially the same “social visibility” test that similar applicants failed for years.

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applicant can demonstrate “that the Guatemalan Government was unwilling or unable to control the ‘private’ actor.” *Id.* at 395 (quoting *Gutierrez-Vidal v. Holder*, 709 F.3d 728 at 732–33 (8th Cir. 2013)).

<sup>104</sup> *Id.* at 393–94 (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)).

<sup>105</sup> *Matter of R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

<sup>106</sup> 26 I. & N. Dec. at 395.

Another problem in *Matter of A-R-C-G-* is the BIA's circular logic when it defines a particular social group in terms of its persecution.<sup>107</sup> The BIA's scant analysis does little to resolve this issue. Notably, the BIA has consistently resisted this type of circularity.<sup>108</sup> For example, in *Matter of A-M-E- & J-G-U-*, the BIA expressly held that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm."<sup>109</sup> Nonetheless, the BIA did not acknowledge this inconsistency in its reasoning in *Matter of A-R-C-G-* and it left its analysis to rest almost exclusively on concessions made by the DHS.<sup>110</sup>

Still, the frailties in the BIA's logic may be irrelevant. If immigration judges simply copy the BIA's holding that domestic violence victims can constitute a cognizable social group, such asylum seekers will succeed. However, mere imitation should not dictate possible life-or-death decisions. Moreover, such weak reasoning is exactly what caused the current major problem with asylum claims—inconsistencies in adjudication.<sup>111</sup> This issue raises a larger question: Should there be a social distinction requirement at all? Whether the requirement is referred to as "social distinction" or "social visibility," should applicants even have to demonstrate that their society perceives them as a member of a distinct social group?

#### 4. *The UNHCR Approach to Social Groups*

The United Nations High Commissioner for Refugees (UNHCR) has issued numerous guidelines stating that it believes that asylum seekers should not necessarily have to demonstrate social perception of their particular social group.<sup>112</sup> UNHCR accepts social perception as a useful way for

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<sup>107</sup> See *id.* at 392–93.

<sup>108</sup> See, e.g., *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) ("[A] social group cannot be defined exclusively by the fact that its members have been subjected to harm." (quoting *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007))); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 218 (B.I.A. 2014) ("[A] social group cannot be defined exclusively by the fact that its members have been subjected to harm." (quoting *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007))).

<sup>109</sup> 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

<sup>110</sup> 26 I. & N. Dec. at 392–93.

<sup>111</sup> See *supra* Part I.A.

<sup>112</sup> See U.N. High Comm'r for Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 45, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2013), <http://www.unhcr.org/509136ca9.pdf> [<http://perma.cc/L6PT-7HCG>]; see also Michelle Foster, The 'Ground with the Least Clarity': A Compara-

asylum seekers to define their particular social group, but it has explicitly stated that social perception is only one of two *alternative* approaches to defining a particular social group.<sup>113</sup> It has declared that asylum seekers should be able to base their definition of a particular social group on social perception or on a common immutable characteristic—“both approaches are legitimate. The group only needs to be identifiable through one of the approaches, not both.”<sup>114</sup>

The UNHCR thinks that because the two approaches could lead to different results, they should serve as alternative ways to prove that a particular social group exists.<sup>115</sup> Requiring a proposed group to meet both tests is overly restrictive and may result in “protection gaps,” especially due to variations in applying each approach.<sup>116</sup> UNHCR is concerned that such gaps could lead decision makers to disregard groups that the 1951 Convention is designed to protect.<sup>117</sup> For example, UNHCR pointed out that even groups previously recognized by the BIA, such as young women opposed to female genital mutilation who had not been subjected to it, may not satisfy both tests

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tive Study of Jurisprudential Developments Relating to ‘Membership of a Particular Social Group,’ at 14, U.N. Doc. PPLA/2012/02 (Aug. 2012) [hereinafter Ground with the Least Clarity], <http://www.refworld.org/docid/4f7d94722.html> [<http://perma.cc/2RDH-L367>] (discussing the UNHCR’s approach to particular social group analysis and analyzing numerous UNHCR guidelines on that topic).

<sup>113</sup> See, e.g., U.N. High Comm’r for Refugees, UNHCR Statement on the Application of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to Victims of Trafficking in France, at 3 (June 12, 2012), <http://www.refworld.org/docid/4fd84b012.html> [<http://perma.cc/GZL6-7XLM>] (“UNHCR’s Social Group Guidelines acknowledge the validity of each approach and attempt[ ] to thus accommodate both as *alternative* approaches in a standard definition . . .”).

<sup>114</sup> U.N. High Comm’r for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 34 (Mar. 31, 2010), <http://www.unhcr.org/refworld/docid/4bb21fa02.html> [<https://perma.cc/AC9J-TY26>].

<sup>115</sup> U.N. High Comm’r for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶¶ 9-11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Guidelines on International Protection], <http://www.unhcr.org/3d58de2da.html> [<http://perma.cc/ED6Y-JTM4>].

<sup>116</sup> See *id.* ¶ 10.

<sup>117</sup> Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner at 25, *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011) (No. 08-4564) [hereinafter UNHCR Brief], <http://www.unhcr.org/refworld/docid/49ef25102.html> [<http://perma.cc/S8P2-G2CK>]. The UNHCR specifically emphasized the need to protect groups that meet the social perception test but not the immutable and fundamental characteristic requirement, such as groups based on occupation or social class. See Guidelines on International Protection, *supra* note 115, ¶¶ 9-13.

because members of society may not be aware of those women.<sup>118</sup>

Relying on social perception as one of two separately sufficient ways to define a particular social group is appealing because it extends protection to groups that satisfy either test. This is significant for domestic violence victims because the BIA has not yet declared that they necessarily satisfy either test. Although the BIA has recognized gender as an immutable characteristic, it has not yet accepted groups defined by gender alone.<sup>119</sup> The BIA stated in *Matter of A-R-C-G-* only that marital status “*can* be an immutable characteristic where the individual is unable to leave the relationship,” not that it necessarily is an immutable characteristic.<sup>120</sup> Furthermore, such a declaration would not protect unmarried victims. Allowing either approach to suffice could make an important difference for domestic violence victims in particular because their abuse is often hidden behind closed doors, making it less likely that society perceives group members, since it does not see them.<sup>121</sup>

Additionally, under the UNHCR approach socially perceived groups of domestic violence victims comprised of both genders could qualify as “particular social groups” even though they are not based on the immutable characteristic of being a woman.<sup>122</sup>

Thus, the UNHCR approach would give immigration judges more freedom to focus on the merits, rather than the approach, of domestic violence victims’ claims that they constitute a particular social group. This would be better because applicants would more likely be judged on the merits of their claim, rather than on a technicality requiring both tests, even if one is already clearly met.

Still, the UNHCR’s approach is not perfect. Numerous scholars have pointed out various ambiguities and uncertainties in the UNHCR’s approach.<sup>123</sup> One concern is that it is overinclusive, possibly to the point that it does not limit the pool of asylum applicants at all.<sup>124</sup> Another issue is that it is

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<sup>118</sup> See UNHCR Brief, *supra* note 117, at 25–26.

<sup>119</sup> See *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392–93 (B.I.A. 2014).

<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> See *supra* note 48 and accompanying text.

<sup>122</sup> See Guidelines on International Protection, *supra* note 115, at ¶¶ 9–15.

<sup>123</sup> See, e.g., Ground with the Least Clarity, *supra* note 112, at 14–15 (“One element of the UNHCR definition [of particular social group] that might be thought unclear is the idea that a [particular social group] is one whose members share a common characteristic other than their risk of being persecuted or who are perceived as group [sic].”).

<sup>124</sup> See *id.* at 15.

not clear whether the social perception alternative is aimed at determining if a group is objectively distinguishable, or if it is focused on the “subjective perceptions of those in the relevant society.”<sup>125</sup> Nonetheless, the benefits of the UNHCR approach may outweigh the drawbacks, particularly as compared to the problems with the United States’ current framework.<sup>126</sup> However, adopting the UNHCR’s approach to social perception does not address problems that domestic violence victims may encounter as they attempt to meet another requirement to qualify for asylum in the United States: nexus.

### C. Nexus: The Everlasting Issue

Nexus also remains an obstacle to domestic violence-based asylum claims. The BIA did not interpret nexus in a new fashion in *Matter of A-R-C-G*.<sup>127</sup> Rather, the BIA emphasized that “[i]n particular, the issue of nexus will depend on the facts and circumstances of an individual claim.”<sup>128</sup> Accordingly, immigration judges will likely apply the nexus requirement as they did in the past—oftentimes to deny asylum claims based on domestic violence.<sup>129</sup> Further, the BIA’s qualification that nexus evaluations depend on individual circumstances could provide hesitant judges with a convenient excuse to deny claims for failing to satisfy the nexus requirement.

The new “social distinction” concept, combined with the BIA’s official recognition that domestic violence victims can constitute a cognizable particular social group, could provide a theoretical foundation for judges to more easily recognize nexus in domestic violence claims in the future. However, as discussed above, “social distinction” is not a novel concept.<sup>130</sup> Thus, although it could be applied dramatically differently than “social visibility,” that possibility is not certain and seems unlikely.

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<sup>125</sup> *Id.* at 75.

<sup>126</sup> See *infra* Part III.D. for further discussion of the fear that lowering limitations on asylum grants could cause an influx of asylum seekers.

<sup>127</sup> See 26 I. & N. Dec. 388, 395 (B.I.A. 2014).

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., *Matter of R-A-*, 22 I. & N. Dec. 906, 917, 920 (B.I.A. 1999) (en banc) (denying asylum to a domestic violence victim in part because she could not prove nexus, i.e., that she was persecuted because of her political opinion or her membership in a particular social group), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

<sup>130</sup> See *supra* Part II.A–B.



#### D. Problems Presented by *Matter of A-R-C-G-*

In the end, *Matter of A-R-C-G-* opened a window for willing judges to grant asylum to domestic violence victims, but it did not provide a sound footing for such claims. It does not set up a framework that drives judges to accept such claims. Once again, it is up to immigration judges—the real arm of the law—to enact change. The question is, will they?

*Matter of A-R-C-G-* is the BIA's clearest comment on domestic violence-based asylum claims in more than a decade. It indicated that the BIA now favors granting asylum in at least some domestic violence asylum cases. However, this move may not be enough to override immigration judges' concerns about a shift. Ultimately, *Matter of A-R-C-G-* leaves the situation much the same as before—"whether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge . . . ."<sup>131</sup>

### III

#### SUGGESTED SOLUTIONS IN LIGHT OF *MATTER OF A-R-C-G-*

What changes could provide a sound footing for domestic violence asylum claims? Now that the BIA has recognized that domestic violence victims can form a particular social group, is it necessary to add gender as a sixth ground for asylum? Should the BIA recognize a "particular social group" based solely on gender? Although the BIA confirmed in *Matter of A-R-C-G-* that gender is considered an immutable characteristic, it did not accept a particular social group defined by gender alone.<sup>132</sup> What changes should be made in light of *Matter of A-R-C-G-*?

Over the years numerous scholars have recommended that the BIA recognize a social group defined by gender.<sup>133</sup> For example, Jessica Marsden advocated such recognition with the hope that it would focus analysis on a factual inquiry into an asylum seeker's circumstances rather than the legal adequacy of a proposed social group.<sup>134</sup> In *Matter of A-R-C-G-* the BIA recognized that domestic violence victims can constitute a par-

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<sup>131</sup> Bookey, *supra* note 19, at 147–48 (discussing domestic violence asylum claims after *Matter of R-A-* and *Matter of L-R-* but before *Matter of A-R-C-G-*).

<sup>132</sup> 26 I. & N. Dec. at 392.

<sup>133</sup> See, e.g., Marsden, *supra* note 8, at 2544–46 (proposing a regulation stating that "a social group defined solely by the gender of its members is cognizable as a particular social group").

<sup>134</sup> *Id.* at 2545.

ticular social group depending on the circumstances in the asylum seeker's country.<sup>135</sup> However, it did not hold that domestic violence victims necessarily qualify as a particular social group. Thus, although the BIA's decision in *Matter of A-R-C-G* potentially shifts claim analysis toward a greater focus on the particular asylum seeker's circumstances and country conditions,<sup>136</sup> it has not made such a change mandatory. Additionally, *Matter of A-R-C-G* did not address the problem of inconsistency in claim adjudication.<sup>137</sup>

Overall, although *Matter of A-R-C-G* marked a step forward for domestic violence victims seeking asylum, the holding contains several significant limitations and ultimately does not provide such asylum seekers with certainty that their claims will succeed. Further, the BIA is unlikely to make any more radical changes that could provide such security. Still, that does not mean that progress has been halted.

A. How Immigration Judges Can Apply and Expand *Matter of A-R-C-G*'s Approach to "Particular Social Groups"

The BIA's holding in *Matter of A-R-C-G* provides openings that immigration judges can use to asylum seekers' advantage, if they so desire. Most notably, although the BIA only recognized a very narrowly defined, country-specific social group in *Matter of A-R-C-G*, "married women in Guatemala who are unable to leave their relationship,"<sup>138</sup> immigration judges could extend the holding by recognizing the same social group based on the same types of evidence but in a different country. Decision makers could expand the holding piecemeal by granting asylum to similarly situated women from one other country and then another and so forth. Eventually the geographic limitation could be dropped from the definition altogether.

Toward that end, immigration judges should follow the framework that the BIA used to determine that the conditions in Guatemala satisfied the social distinction requirement. By doing so, decision makers can grant asylum to otherwise-qualified applicants from countries with conditions very similar to Guatemala without much fear that the BIA will overturn their decisions.

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<sup>135</sup> 26 I. & N. Dec. at 394–95.

<sup>136</sup> See *id.* ("[W]ithin the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions . . .").

<sup>137</sup> See *supra* Part I.A.

<sup>138</sup> *Matter of A-R-C-G*, 26 I. & N. Dec. at 390.

Based on the BIA's reasoning in *Matter of A-R-C-G*-, the main evidence that the BIA relied on to analyze Guatemala's "documented country conditions" were: (1) laws designed to protect domestic violence victims, (2) problematic enforcement of those laws, (3) a culture of domestic violence, and (4) high rates of domestic violence, including sexual offenses.<sup>139</sup> Judges should rely on the same types of evidence to grant asylum to applicants from countries with conditions similar to Guatemala, normalizing such grants over time.

The BIA's decision to open asylum to Guatemalan victims of domestic violence paved the way for similarly situated asylum seekers from other countries. Now it is up to judges to extend *Matter of A-R-C-G*- by using the same reasoning to grant asylum to women from other countries. Further, a piecemeal approach could be used to expand asylum to similarly situated victims in Guatemala and elsewhere, and to others, such as unmarried women or men, who are excluded from the narrow social group recognized in *Matter of A-R-C-G*-. By steadily reinforcing and building on the BIA's reasoning in *Matter of A-R-C-G*-, it should eventually become clear that all domestic violence victims who cannot leave their relationship should have access to asylum, regardless of marital status, gender, or national origin.

#### B. Eliminating the Nexus Requirement for Domestic Violence-Related Asylum Cases

A more drastic but effective change would be to eliminate the nexus requirement for domestic violence-related asylum applicants. Such a change would address the inconsistency that arises when judges have to make numerous decisions during asylum claim analysis—fewer decisions leave fewer chances for inconsistency.<sup>140</sup> Toward that end, Marsden has recommended that the nexus between gender and domestic violence should be established as a matter of law (building on her suggestion that gender qualifies as a social group).<sup>141</sup> That recommendation can easily be adapted to the post-*Matter of A-R-C-G*- setting: when a particular social group based on domestic violence is recognized, nexus should be assumed. This assumption would lessen the obstacles facing domestic violence victims seeking asylum and decrease the opportunities for inconsistent adjudication.

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<sup>139</sup> *Id.* at 394–95.

<sup>140</sup> See Marsden, *supra* note 8, at 2550–51.

<sup>141</sup> *Id.* at 2550.

Although nexus is not generally presumed as a matter of law, such an approach is not unprecedented. For example, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, it amended the “refugee” definition to specify that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . shall be deemed to have been persecuted on account of political opinion.”<sup>142</sup> Just as Congress revised the definition of refugee in 1996 in response to “the violation of a person’s basic right to procreate,”<sup>143</sup> it could similarly revise immigration regulations to address human rights violations suffered by domestic violence victims around the world.

However, one major challenge to eliminating the nexus requirement for domestic violence victims is justifying why they should benefit from such a change but other asylum applicants should not. Nexus should apply differently in domestic violence-related asylum cases because of the exceptional difficulties of proof presented by the unique and hidden nature of such persecution.<sup>144</sup> Barbara Barreno has noted that domestic violence victims often find it extremely difficult to convince adjudicators that they were harmed *because* their abusers perceived them as part of a specified particular social group.<sup>145</sup>

For example, in *Matter of R-A-*, although the BIA acknowledged that Rody Alvarado had suffered “tragic and severe spouse abuse,”<sup>146</sup> it found that it was “not . . . reasonable to believe that . . . social group membership led even in part to the respondent’s abuse.”<sup>147</sup> Rather, the BIA found it more plausible that a “warped perception of and reaction to [Alvarado’s] behavior, . . . psychological disorder, pure meanness, or no apparent reason at all” motivated Alvarado’s abuser.<sup>148</sup> However, as the vociferous dissent pointed out: “domestic violence exist[s] as a means by which men may systematically destroy the power of women . . . . The fundamental purpose of domes-

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<sup>142</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 601(a)(1), 110 Stat. 3009-546, 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2012)).

<sup>143</sup> See Sean T. Masson, Note, *Cracking Open the Golden Door: Revisiting U.S. Asylum Law’s Response to China’s One-Child Policy*, 37 HOFSTRA L. REV. 1135, 1151 (2009).

<sup>144</sup> See *supra* note 48 and accompanying text.

<sup>145</sup> See Barreno, *supra* note 16, at 258.

<sup>146</sup> *Matter of R-A-*, 22 I. & N. Dec. 906, 927 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

<sup>147</sup> *Id.* at 925.

<sup>148</sup> *Id.* at 927 (emphasis added).

tic violence is to punish, humiliate, and exercise power over the victim on account of her gender.”<sup>149</sup>

Significantly, domestic abuse usually occurs in the home, away from prying eyes—and witnesses.<sup>150</sup> Further, domestic violence victims often hide their abuse, even from their closest friends and family members.<sup>151</sup> These characteristics make it particularly difficult for victims to provide evidence demonstrating their abuser’s motives. The hidden nature of domestic abuse sets it apart from other harms and human rights violations. For example, female genital mutilation is recognized internationally as a violation of human rights.<sup>152</sup> However, female genital mutilation is almost universally performed in some communities where it is considered a social norm.<sup>153</sup> Further, traditional circumcisers or medical experts generally execute the act and their professional role indicates their motive.<sup>154</sup> These differences are significant because nexus turns on the persecutor’s motivation to act, and adjudicators may want proof that a persecutor sought to harm more than one member of a proposed particular social group.<sup>155</sup> Thus, domestic violence-based asylum cases should be treated differently. Still, the potential (arguably) negative consequences of changing the nexus requirement should be assessed.

First, applying nexus differently in domestic violence-related asylum cases adds another exception to an already complex system. Second, treating domestic violence victims differently could be seen as a step down a slippery slope to eroding the nexus requirement entirely, one particular social group at a time. However, nearly twenty years have passed since Congress exempted certain asylum applicants from the nexus requirement—those forced to undergo abortions or in-

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<sup>149</sup> *Id.* at 939 (Guendelsberger, J., dissenting) (citation omitted).

<sup>150</sup> See WORLD HEALTH ORG.[WHO], WORLD REPORT ON VIOLENCE AND HEALTH 96 (Etienne G. Krug et al. eds., 2002), [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/full\\_en.pdf?ua=1](http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf?ua=1) [<http://perma.cc/ASW3-WMB2>] (“Studies have shown that around 20–70% of abused women never told another person about the abuse until they were interviewed for the study.”).

<sup>151</sup> See *id.*

<sup>152</sup> See WHO, *Female Genital Mutilation* (Feb. 2016), <http://www.who.int/mediacentre/factsheets/fs241/en/> [<http://perma.cc/HGW3-Q6H9>].

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See, e.g., *Matter of R-A-*, 22 I. & N. Dec. 906, 920 (B.I.A. 1999) (en banc) (“If group membership were the motivation behind [the persecutor’s] abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group.”), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

voluntary sterilization under “a coercive population control program”—and other applicants still need to demonstrate nexus.<sup>156</sup> Further, perhaps a system without a nexus requirement would function more smoothly and effectively protect more at risk asylum seekers. Either way, on balance, the nexus requirement should be eliminated in domestic violence-related asylum cases to mitigate issues of inconsistency in adjudication and to effectively accommodate problems of proof that are particular to domestic violence victims.

Such a drastic change—in effect, eliminating the nexus requirement for domestic violence-based claims—appears unlikely to come from the BIA, which has the power to create new precedent but has instead focused on cautiously altering its approach over time,<sup>157</sup> or immigration judges, who must follow the BIA’s precedential decisions.<sup>158</sup> Additionally, the BIA does not have the legal authority to make a more sweeping change by adding gender as a sixth ground for asylum—only Congress does.<sup>159</sup> Realistically, any more radical developments would need to come from outside the BIA; for example, Congress could make amendments to the federal asylum regulations.

### C. Creating Change by Revising and Enacting the Asylum Regulation Amendments

Ideally, the proposed yet still pending regulations should be amended to codify *Matter of A-R-C-G*’s recognition that domestic violence victims can constitute a cognizable social group for asylum purposes, as well as other beneficial changes. The regulations have been pending for more than a decade and do not reflect more recent precedent, such as *Matter of A-R-C-G*.<sup>160</sup> However, simply including the ruling made in *Matter of A-R-C-G* would not provide domestic violence victims

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<sup>156</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 601(a)(1), 110 Stat. 3009-546, 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2012)).

<sup>157</sup> See, e.g., *Matter of A-R-C-G*, 26 I. & N. Dec. 388, 392 (B.I.A. 2014) (“The ‘social distinction’ requirement renames the former concept of ‘social visibility’ and clarifies ‘the importance of “perception” or “recognition” to the concept of the particular social group.’” (quoting *Matter of W-G-R*, 26 I. & N. Dec. 208, 216 (B.I.A. 2014))).

<sup>158</sup> See *supra* notes 22 and 63 and accompanying text.

<sup>159</sup> Adding gender as a sixth ground would be more drastic because the INA only recognizes five specified grounds for asylum, whereas the “particular social group” provision is not strictly defined or limited. Congress would need to amend the statute. See Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2012).

<sup>160</sup> See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000).

with an adequately certain avenue to asylum, for the reasons discussed above. Instead, the regulations should be amended to include additional changes, such as eliminating the nexus requirement for domestic violence victims. Enacting regulation amendments along the lines described below would provide a solid footing for future asylum applicants.

### 1. *Previously Proposed Asylum Regulation Amendments*

The INS's proposed amendments to the regulations were intended to "aid in the assessment of claims made by applicants who have suffered or fear domestic violence."<sup>161</sup> They were crafted partly in response to the uproar caused by the 1999 decision in *Matter of R-A*.<sup>162</sup> The proposed amendments would revise the definition of "persecution," the nexus requirement, and the meaning of "membership in a particular social group."<sup>163</sup> However, the revisions are outdated in light of decisions such as *Matter of A-R-C-G*.<sup>164</sup> They should be updated to reflect the current state of the law. Additional changes should be made to address the particular needs of domestic violence victims seeking asylum in the United States and achieve the stated goal of the amendments.

For example, under the previously proposed amendments, in a case involving a persecutor with mixed motives, applicants claiming membership in a particular social group would have to show that their group membership is "central to the persecutor's motivation to act against the [victim]" to satisfy nexus.<sup>165</sup> This would codify the standard relied on in recent cases, such as *Matter of W-G-R*.<sup>166</sup> However, as discussed above, that standard does not adequately aid the assessment of claims by domestic violence victims.

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<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 76,589 ("This proposed rule removes certain barriers that the *In re R-A* decision seems to pose to [domestic violence-based] claims . . ."); see also *supra* note 36 and accompanying text.

<sup>163</sup> See Asylum and Withholding Definitions, 65 Fed. Reg. at 76,597-98 (proposed Dec. 7, 2000). Please note that the proposed amendments would also revise several other points.

<sup>164</sup> Further, the amendments were arguably misguided even at the time they were enacted. For example, see Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1592 (2001), for a critique contemporaneous with the proposed regulations.

<sup>165</sup> Asylum and Withholding Definitions, 65 Fed. Reg. at 76,598.

<sup>166</sup> See 26 I. & N. Dec. 208, 224 (B.I.A. 2014) ("The respondent bears the burden of showing that his membership in a particular social group was or will be a central reason for his persecution.").

Similarly, although the preamble to the amendments evokes the holding in *Matter of A-R-C-G* when it notes that “[g]ender is clearly such an immutable trait . . . [and that] there may be circumstances in which an applicant’s marital status could be considered immutable,”<sup>167</sup> the proposed definition of “membership in a particular social group” does not unequivocally state that either characteristic is in itself enough to define a particular social group.<sup>168</sup>

To provide solid footing for asylum claims based on domestic violence, the proposed regulation amendments need to be revised.

## 2. *Revising the Regulations in Light of Matter of A-R-C-G*

The regulation amendments should be changed in two key ways to solve the myriad issues that remain even after *Matter of A-R-C-G*. First, the UNHCR’s approach to assessing proposed particular social groups should be adopted. Additionally, gender should be explicitly recognized as a particular social group. Second, applicants in domestic violence-based asylum cases should be exempt from the nexus requirement, for the reasons discussed above.<sup>169</sup>

If the asylum regulations are revised in these ways, adjudicators can avoid the various problems with the current system that are discussed at length in Parts II.B.3–III.B, such as inconsistency in adjudication and problems of proof particular to domestic violence victims. Additionally, these changes will obviate the need to pursue other, less effective remedies to resolve the issues with the current system. For example, if the regulations expressly state that a particular social group can be defined by gender, adjudicators will not need to slowly expand *Matter of A-R-C-G*’s holding to encompass groups of female domestic violence victims from countries other than Guatemala. Asylum applicants can instead base their claims on their membership in the particular social group of “women.”

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<sup>167</sup> Asylum and Withholding Definitions, 65 Fed. Reg. at 76,593 (proposed Dec. 7, 2000).

<sup>168</sup> See *id.* at 76,598.

<sup>169</sup> See *supra* Part III.B. Alternatively, the government could adopt UNHCR’s bifurcated approach to nexus, which was designed to work in conjunction with the UNHCR approach to assessing proposed particular social groups. See Guidelines on International Protection, *supra* note 115, ¶¶ 22–23. This bifurcated approach allows applicants to demonstrate nexus by establishing that their persecutor harmed them because of their membership in a particular social group or that their State was unwilling or unable to protect them because of their membership in a particular social group. See *id.*



## D. No Need to Fear a Flood of Asylum Seekers

When pushing for progress, it is important to keep opponents' concerns in mind to avoid inciting needless backlash that could delay future progress or even set it back. In the domestic violence-based asylum context, those who resist reform frequently raise the "fear of 'opening the floodgates.'"<sup>170</sup> Immigration opponents fear that if the United States expands its asylum protections, asylum seekers will flood into the United States, overwhelming the immigration system.<sup>171</sup> At first glance, this concern seems rational, given that domestic violence is a global issue affecting countless people, particularly women.<sup>172</sup> Nonetheless, this fear likely does not warrant restricting asylum for numerous reasons.

First, domestic violence causes psychological effects that make victims unlikely to flee abuse.<sup>173</sup> Second, domestic violence victims may very well wish to leave their abusers but not their country and other family members, particularly their children.<sup>174</sup> Third, the BIA's comparable recognition in *Matter of Kasinga* that female genital mutilation victims can constitute a particular social group did not lead to an influx of asylum seekers.<sup>175</sup> Further, asylum applicants have not flooded Canada, even though it has accepted asylum applications based on domestic violence since 1993.<sup>176</sup> In fact, between 1995 and 1999 Canada received ever-fewer gender-related asylum claims.<sup>177</sup> Additionally, as the DHS has pointed out, the United States did not experience a rise in domestic violence-based asylum claims after Alvarado was granted asylum in

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<sup>170</sup> See Cianciarulo & David, *supra* note 9, at 380; Marsden, *supra* note 8, at 2553; Reimann, *supra* note 31, at 1258.

<sup>171</sup> See *supra* note 170.

<sup>172</sup> See *supra* notes 1–4 and accompanying text.

<sup>173</sup> See Cianciarulo & David, *supra* note 9, at 381.

<sup>174</sup> See *id.*; see also Reimann, *supra* note 31, at 1260 ("[W]omen are often the primary or only caretakers of children and may not wish to leave their families behind or endanger them by taking them along . . .").

<sup>175</sup> 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996); see also Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132–33 (2007) (noting that an INS publication admitted that "INS has not seen an appreciable increase in the number of claims based on FGM" since the *Kasinga* decision (quoting IMMIGRATION & NATURALIZATION SERV., U.S. DEPT OF JUSTICE, *Questions and Answers: The R-A- Rule* (Dec. 7, 2000), [http://cgrs.uchastings.edu/sites/default/files/RA\\_Rule\\_USCIS\\_12\\_07\\_2000.pdf](http://cgrs.uchastings.edu/sites/default/files/RA_Rule_USCIS_12_07_2000.pdf) [<https://perma.cc/T342-JCJ5>])).

<sup>176</sup> See DHS Brief, *supra* note 53, at 13 n.10.

<sup>177</sup> See *id.*

*Matter of R-A*.<sup>178</sup> These facts suggest that the fear of the floodgates is unwarranted with regard to domestic violence victims.

Finally, the asylum adjudication system is focused on fact-based inquiry into each applicant's circumstances.<sup>179</sup> Only individual asylum seekers who can prove that they meet the INA's requirements are eligible for asylum. On principle, qualifying applicants should not be rejected simply because changes to the system might increase the applicant pool.<sup>180</sup> Prematurely rejecting applicants who could qualify for asylum simply because they are domestic violence victims would make the asylum claim process pointless. Additionally, even if an applicant meets all the legal requirements for asylum, an immigration judge still has discretion to deny the application.<sup>181</sup> Therefore, the BIA and immigration judges should not let the fear of opening the floodgates dictate their approach to asylum adjudication.

#### CONCLUSION

In *Matter of A-R-C-G* the BIA officially recognized that under certain circumstances, domestic violence victims constitute a cognizable particular social group. This holding marked a significant step forward for domestic violence victims seeking asylum in the United States. However, it still does not provide such applicants with any certainty that their claims will succeed. If such security is the goal, further changes must be made. At the least, immigration judges should expand the holding to apply to asylum seekers from countries other than Guatemala. Eventually, decision makers will also need to drastically reinterpret aspects of asylum analysis and perhaps even eliminate requirements such as nexus, because the current system does not fully accommodate domestic violence's complexities. This can be achieved by amending the federal asylum regulations. Ultimately, although *Matter of A-R-C-G* is an important step toward providing asylum for domestic violence victims, it does not go far enough.

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<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., Gregory S. Porter, *Persecution Based on Political Opinion: Interpretation of the Refugee Act of 1980*, 25 CORNELL INT'L L.J. 231, 263 (1992) ("Adjudications of asylum applications are very much fact-based and decisions often come down to issues of credibility.").

<sup>180</sup> See Marsden, *supra* note 8, at 2553.

<sup>181</sup> See generally Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 604–11 (2012) (discussing the development of discretion as an element in asylum eligibility).

